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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 466

PARFAIT POWDER PUFF COMPANY, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 117–121) and the opinion of the district court (R. 94–96) have not been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 4, 1947 (R. 122). The petition for a writ of certiorari was filed December 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Is there sufficient evidence to support the conclusion of the courts below that petitioner introduced into interstate commerce the adulterated cosmetics?

2. Whether petitioner is excepted from the penal provisions of Section 303 (a) as one who received the adulterated cosmetic in interstate commerce, within the meaning of Section 303 (c).

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 201 [21 U. S. C. 321]. For the purposes of this Act—
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> * * * * *
>
> (e) The term "person" includes individual, partnership, corporation, and association.
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> * * * * *
>
> SEC. 301 [21 U. S. C. 331]. The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> * * * * *
>
> (c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.
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> * * * * *

SEC. 303 [21 U. S. C. 333]. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; * * *.

* * * * *

(c) No person shall be subject to the penalties of subsection (a) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Administrator the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; * * *.

* * * * *

SEC. 601 [21 U. S. C. 361]. A cosmetic shall be deemed to be adulterated—

(a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual: * * *.

STATEMENT

On June 13, 1945, an information in 7 counts was filed against petitioner in the United States

District Court for the Northern District of Illinois, each count of which charged that at a specified time petitioner unlawfully introduced into interstate commerce a shipment of adulterated cosmetics in that it contained a poisonous and deleterious substance, in violation of Section 301 (a) of the Federal Food, Drug, and Cosmetic Act (R. 2–9).

After trial by the district court without a jury, petitioner was found guilty and was fined $100 (R. 96). Upon appeal to the circuit court of appeals, the judgment was affirmed (R. 122).

Most of the facts are not in dispute. By stipulation (R. 11–14) between the parties, it was agreed (1) that the cosmetics involved in this case (hair lacquer pads) were adulterated as charged in that they contained a deleterious substance which might render them injurious to users under the conditions of use prescribed on their labels, and (2) that these cosmetics had been shipped interstate. The only question presented to the courts below was whether petitioner had introduced these adulterated cosmetics, or delivered them for introduction, into interstate commerce in violation of Section 301 (a), and if so, whether it was exempt from punishment by reason of the provisions of Section 303 (c) (1).

The petitioner is a corporation engaged in the manufacture and sale of cosmetic products. In May of 1943, petitioner, through its president, entered into an arrangement with Helfrich Labo-

ratories for the manufacture, packaging, and distribution of hair lacquer pads. (R. 58–59.) Helfrich Laboratories is a manufacturer of cosmetics and semi-pharmaceutical products, but sells nothing under its own label (R. 17). Under the arrangement (1) petitioner undertook to supply Helfrich Laboratories with jars, caps, labels, display cards, flannel pads, and shipping containers; (2) Helfrich Laboratories agreed to impregnate the flannel pads with a shellac hair lacquer, and to package and label the pads with petitioner's labels bearing its name and address; and (3) Helfrich Laboratories undertook to ship the finished product to petitioner's customers, pursuant to shipping instructions and bills-of-lading supplied by it. The bills-of-lading bore petitioner's name and address as consignor. (R. 19–20, 22, 58–59, 78.) The finished product sometimes was shipped out on the day it was packaged, or sometimes the next day, in which case it would go to the stockroom of Helfrich Laboratories awaiting shipping orders from petitioner (R. 25). Petitioner reserved, and through its general sales manager frequently exercised, the right to appear in the shipping room of Helfrich Laboratories and direct that certain orders be given priority over others and shipped immediately (R. 49, 52, 75).

The cosmetic in question was named "Locks-Up", a name selected by the petitioner's president (R. 59.) Helfrich Laboratories never

shipped any package of Locks-Up without first having received a shipping order from petitioner (R. 23, 74.) Following shipment to consignees designated by petitioner, Helfrich Laboratories billed the petitioner at 8¢ a jar for the amounts shipped (R. 63, 97). Petitioner, not Helfrich Laboratories, invoiced its customers at about 20¢ a jar for the products which Helfrich Laboratories had shipped to them at petitioner's request (R. 59, 60–61.) When Helfrich Laboratories shipped Locks-Up c. o. d., petitioner received the collection money (R. 75.)

The adulterated character of the shipments upon which the information was based resulted from a substitution by Helfrich Laboratories of a gum lacquer for a shellac lacquer, apparently without petitioner's knowledge (R. 30, 68, 82.)

ARGUMENT

The questions before this Court are (1) whether, in view of the fact that Helfrich did the actual shipping of the product, there is sufficient evidence to support the conclusion of the courts below that petitioner introduced the adulterated cosmetics into interstate commerce, and (2) whether Section 303 (c) (1) of the Act exempts petitioner from the penalties provided by Section 303 (a). We submit that the courts below were clearly correct in answering the first question in the affirmative and the second in the negative.

I

It is well-settled that statutes imposing criminal liability for acts which may be dangerous to the public, even when committed without intent to harm, have as their aim the inculcation of an attitude of vigilant care on the part of those responsible for the operation of the enterprise involved. *United States* v. *Balint et al.*, 258 U. S. 250, 254; *New York Central & Hudson River Railroad Company* v. *United States*, 212 U. S. 481, 495. This Court pointed out specifically in *United States* v. *Dotterweich*, 320 U. S. 277, 281, that section 201 (e) of the Federal Food, Drug, and Cosmetic Act defines "person" to include "corporation", and that this definition is sufficient to hold corporations criminally liable under the statute for the acts of their agents.

We submit that under the facts present in this case, it can by no means be stated, as declared by petitioner (Pet. 12), that the doctrine established by the circuit court of appeals "pledges one's personal liberty as forfeit for a stranger's crime" or "presents a perilous challenge to freedom of lawful contract." Helfrich Laboratories was not a "stranger" to petitioner, and it is clear that petitioner conducted an interstate business in the sale of Locks-Up through the medium of Helfrich Laboratories. It sought and obtained orders for the product from outside the State of Illinois, and

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filled them by directing Helfrich Laboratories, with which it had both a manufacturing and shipping arrangement, to ship specified quantities to designated customers.

In the Statement, *supra,* pp. 4–6, we have set forth the details of the relationship between petitioner and Helfrich Laboratories. It seems clear that this relationship was one of principal and agent. In *manufacturing* Locks-Up for petitioner, Helfrich Laboratories may well have been acting as an independent contractor. But in *shipping* Locks-Up at the petitioner's order, Helfrich Laboratories was wholly subject to its direction and control. Shipments were made in the name of petitioner and only pursuant to its express wishes. In legal as well as practical contemplation, in each instance it was the shipper through the agency of Helfrich Laboratories. Insofar as the shipment of Locks-Up was concerned, the relationship between the parties, as revealed in the Statement, *supra,* clearly falls within the definition of agency appearing in the Restatement of the Law of Agency, § 1, pp. 7–8.

Petitioner contends that while it authorized the interstate shipment of pads dipped in shellac lacquer, it did not authorize the interstate shipment of pads dipped in gum lacquer. Even the exercise of the highest degree of care, however, will not absolve a corporation from liability under a statute such as is here involved. See *United States* v. *Dotterweich,* 320 U. S. 277. What the

petitioner is really claiming is that it had no intent to violate the law. But intent is not an element of the offenses for which penalties are provided by Section 303 (a) of the Act. *United States* v. *Greenbaum,* 138 F. (2d) 437 (C. C. A. 3), 152 A. L. R. 751.

The facts portray a situation where petitioner took lightly its responsibility to the public to furnish cosmetics that would not be injurious. Although, at the outset of its relationship with Helfrich Laboratories, petitioner had tested a sample and found it to be satisfactory, it failed thereafter to exercise any control whatever over the ingredients of the lacquer and seemed to know or care little with respect to the kind of lacquer being used. It is to be noted, in this connection, that a small percentage of the output of the product was obtained by petitioner from Helfrich Laboratories as samples (R. 23–24), and these could have been tested by it to determine the potentiality of the product for harm. The circuit court of appeals properly held that a passive reliance, such as petitioner's, upon tests which might or might not be given by the instrument chosen by it to introduce a product into interstate commerce, and over which it exercised the degree of control indicated above, does not meet the public policy which requires the highest degree of care from those who cause the introduction into interstate commerce of food, drugs, and cosmetics, whether or not the motivating force behind the transaction can be

labeled as a "principal." It would appear that the controls which an interstate dealer is required to maintain over those acting on his behalf are continuing; and that the fact that a sample examined at the outset of a business relationship is found to be satisfactory is not sufficient forever to absolve such a dealer from liability for subsequent illegal shipments made on his behalf. It would not seem to be stepping beyond the confines of the Federal Food, Drug, and Cosmetic Act, and the reasons for its enactment, to require a concern which is having food, drugs, or cosmetics distributed under its name in interstate commerce to take affirmative precautions to see to it that the product will not be injurious to the public health. Thus, the circuit court of appeals pointed out (R. 118):

> It is clear that defendant was engaged in procuring the manufacture and distribution of the article in interstate commerce. It saw fit to create out of Helfrich's activities in its behalf an instrumentality and to avail itself of the acts of that instrumentality, which effected an introduction into commerce of an adulterated article violative of the standards fixed by the Act. * * * The liability was not incurred because defendant consciously participated in the wrongful act, but because the instrumentality which it employed, acting within the powers which the parties had mutually agreed should be lodged in it, violated the law.

The rationale for holding liable one who has a responsible share in causing the introduction into interstate commerce of a contraband drug product, and relied on by the circuit court of appeals, was enunciated by this Court in *United States* v. *Dotterweich,* 320 U. S. 277, 280–281, 284–285, where it was stated:

> The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. * * *
>
> * * * * * * * * Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance. The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be

> under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

Hall-Baker Grain Co. v. *United States,* 198 Fed. 614 (C. C. A. 8), relied upon by petitioner (Pet. 14), is not opposed either in result or reasoning to the instant case. The facts of that case reveal that the defendant, the Hall-Baker Grain Company, was dealing with a public grain elevator capable of containing 1,000,000 bushels of wheat. All wheat received by the elevator, including that of the defendant, was classified as to grade by an official State Inspector, and commingled in bins according to grade. When an owner of a portion of such wheat ordered the shipment of a certain quantity of a particular grade, the elevator company loaded wheat out of the bin containing such grade. This wheat was then inspected by an official State Inspector who certified it to be of a certain grade. The defendant's contract of sale provided that it was selling a certain grade of wheat classified according to State inspection. The defendant directed the grain company to ship the type of wheat covered

by the contract of sale with the purchaser, and the requisite State inspection was had, but an inspection at destination point revealed that the wheat contained a portion of an inferior grade. The United States Circuit Court of Appeals for the Eighth Circuit, in reversing the conviction of the Hall-Baker Grain Company for shipping in interstate commerce adulterated and misbranded wheat, pointed out that merchants should not be held responsible for the mistakes of third persons "over whom they have no control" (198 Fed. at page 618). It can be readily seen that the control which the defendant in the *Hall-Baker* case exercised over the interstate shipment of the grain was far less than the control exercised by petitioner in the instant case.

In the present case, moreover, petitioner's pads never lost their identity. After being treated with lacquer by the Helfrich Laboratories, they were put in jars supplied by petitioner, and labeled and packaged with materials furnished by it. They were then placed in the stockroom of Helfrich Laboratories, or sent direct to the latter's shipping room as the separate property of the petitioner. Helfrich Laboratories, it will be noted, performed a processing, packaging, and distribution service with respect to materials of which all but one, the lacquer, were provided by the petitioner. The finished pads were shipped only to its customers, upon instructions supplied by petitioner, and under bills of lading furnished by

it and bearing its name. Under these circumstances, it was petitioner's duty, and entirely within its power, to insure that the cosmetics shipped interstate at its behest and under its name should comply with the Federal Food, Drug, and Cosmetic Act and not constitute a public menace.

II

Petitioner asserts that it acted in good faith and made full disclosure of all pertinent facts to the Government and, therefore, is rendered exempt from criminal penalties by the language of Section 303 (c) (1) of the Act. It is apparent from the specific language of that section, however, that its purpose is to relieve an innocent dealer from the penalties of the Act where he has *received adulterated or misbranded goods in interstate commerce* and delivered them in good faith. The section is clearly designed to protect an innocent dealer who has violated Section 301 (c), which prohibits the *receipt in interstate commerce* of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. But that section is not involved in this case. Petitioner was prosecuted as a shipper, not a receiver, under Section 301 (a) of the Act, which prohibits the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. The design of Congress to extend the

exemption created by Section 303 (c) (1) to a dealer who has received a product in interstate commerce so that the interstate shipper can be prosecuted is revealed in Senate Report No. 493, 73d Cong., 2d Sess., accompanying S. 2800, one of the series of bills which led to the passage of the Act. The report states, at page 21:

> The existing law provides for a guaranty whereby a dealer who buys on faith may be protected from liability under the law. This provision has safeguarded innocent dealers and has been extremely useful in fixing responsibility on guilty shippers. It would be continued in effect by paragraph (e). The bill affords in this paragraph further protection to the innocent dealer who distributes goods he has received from interstate sources. If he has failed to secure a guarantee he can escape penalties by furnishing the records of interstate shipment, thus allowing the prosecution to lie solely against the guilty shipper.

It must be borne in mind that both petitioner and Helfrich Laboratories are located in Chicago. In attempting to demonstrate that it received the adulterated cosmetics *in interstate commerce* and, therefore, that it is within the exemption afforded by Section 303 (c) (1), petitioner advances a tortuous theory to the effect that it received the products in interstate commerce at the moment when Helfrich Laboratories delivered them to a carrier for interstate shipment to a consignee des-

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ignated by the defendant. We do not dispute that Helfrich Laboratories was engaged in interstate commerce and did ship the cosmetics interstate. If that were not the situation, no violation of the Act by anyone would have occurred. But the fact that Helrich Laboratories was engaged in interstate commerce, and that the arrangement between it and petitioner may have constituted an interstate transaction, by no means caused petitioner to be one who received the goods involved in interstate commerce.

Section 303 (c) (1) sets up an exemption to the penalties provided by the Act, since it excepts something from the operative effect of the statute and restrains or qualifies the generality of the substantive enactment. It is an established rule of statutory construction that a provision which states an exception from the general policy that the law embodies, or which restricts the general scope of the statute, must be strictly construed and will not be permitted to take any case out of the enacting clause which does not clearly fall within the terms of the exception provision. In *United States* v. *Dotterweich,* 320 U. S. 277, 284, this Court, speaking of the guarantee section of the Act, opposed interpreting "an exception to an important provision safeguarding the public welfare with a liberality which more appropriately belongs to enforcement of the central purpose of the Act."

Petitioner's good faith could not relieve it from its responsibility for having procured the introduction into interstate commerce of deleterious cosmetics. In passing sentence, the district court expressly took into consideration the defendant's lack of scienter and for that reason imposed only a nominal fine of $100 plus costs. Petitioner's good faith served as a mitigating circumstance in the imposition of a penalty, but should not exonerate it from liability occasioned by its carelessness in directing the interstate shipment of adulterated cosmetics injurious to the consuming public.

CONCLUSION

The decision below is clearly correct, and no real conflict of decisions is involved. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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